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ORIGINAL ARTICLE

INTERNATIONAL LEGAL THEORY

On consular internationalism

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Abstract

This article focuses international legal scholars' attention on consular relations, consular work, and related international law. It does so for two main reasons. First, as scholars of diplomatic history and international relations have observed, consular work is of growing significance in global affairs. Second, there are largely unrealized possibilities for thinking about international law, and grappling afresh with its dilemmas, through a consular optic. International law conducted through consular offices and officials advances views of the international legal plane, its key actors, and relations among them, that are distinguishable from those advanced by diplomacy and international law as traditionally conceived. This article theorizes this distinctive logic as consular internationalism. Its argument is that consular internationalism is a richer resource for thought and practice in international law than commonly acknowledged. It is especially relevant, this article aims to show, for analyzing historical and contemporary entanglements of imperial and commercial power, grappling with the role of lay people and unofficial communities in shaping international legal order, and, potentially, supporting anti-hierarchical struggles.

Keywords: consular relations; diplomatic relations; international legal theory; public international law; Vienna Convention on Consular Relations

1. Introduction

Governments' efforts to answer pleas from their nationals abroad, and from non-nationals seeking access to their territories, have for a long time shaped and been shaped by international law. States' attempts to protect nationals extraterritorially have been central to developments in international law concerning the use of armed force.[1] States' consular handling of foreign nationals' claims for

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[1]N. Ronzitti, 'Rescuing Nationals Abroad Revisited', (2019) 24 *Journal of Conflict and Security Law* 431.

asylum and other visas has been the focus of much scholarly attention in international law and adjacent fields.[2] International legal controversy has surrounded incarcerated foreign nationals' access to their home states' consular support, including before the International Court of Justice (ICJ).[3] The ICJ has ruled, too, on international legal immunities that attach to consular premises and staff.[4] And states' support for expatriate nationals, or lack thereof, has influenced developments in the international law on migrants' rights, and the juridical implications of citizenship, including in the context of the recent pandemic.[5]

Some portion of the work involved in states' handling of these issues involves diplomacy and lawyering among high-level state officials: the typical preserve of public international law. Much of it, however, does not. A great deal involves the work of consular offices and officials, including some serving in honorary capacities on the fringes of officialdom.[6] This article investigates international and national legal understandings of that consular work, and imaginaries that emerge within it. Consular work, in this article's conception, encompasses a wide range of routine and emergency work, addressed to nationals and non-nationals, pertaining to cross-border travel, migration, marriage, divorce, investment, trade, education, adoption, litigation and/or nationals' extraterritorial injury, disappearance, death, arrest, or detention.[7]

Consular officials are often cast as the most workaday of envoys on the international legal plane.[8] Paraphrasing the title of a 1971 history of the British Consular service, consular work tends to be framed as Cinderella service: a matter of cleaning up messes and keeping the home fires burning while diplomats travel in proverbial carriages to attend balls.[9] Whereas the Vienna Convention on Diplomatic Relations (VCDR) charges staff of a diplomatic mission with sovereign 'representat[ion]' and 'negotiat[ion]', the equivalent provision of the Vienna Convention on Consular Relations (VCCR) envisions consular officials beavering away in backrooms: protecting the interests of a sending state's nationals, 'both individuals and bodies corporate', transmitting documents, inspecting vessels, and issuing passports and visas.[10]

States' treaty and customary law obligations to respect other states' rights of consular access to their nationals have been the subject of ICJ proceedings, as highlighted above.[11] Beyond that setting, however, scholars of international law have been relatively little concerned with consular

[2]See, e.g., F. Infantino, *Schengen Visa Implementation and Transnational Policymaking: Bordering Europe* (2019).

[3]*Jadhav (India v. Pakistan)*, Merits, Judgment of 17 July 2019, [2019] ICJ Rep. 418; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Merits, Judgment of 31 March 2004, [2004] ICJ Rep. 12; *LaGrand (Germany v. United States of America)*, Merits, Judgment of 27 June 2001, [2001] ICJ Rep. 466 [hereafter *Jadhav* Case, *Avena* Case, *and LaGrand* Case, respectively]. Another case instituted by Paraguay against the United States in April 1998 invoking U.S. obligations under the VCCR was discontinued in November 1998: *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Order of I0 November 1998, [1998] ICJ Rep. 426.

[4]*United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment of 24 May 1980, [1980] ICJ Rep. 3 [hereafter *Tehran Hostages* Case].

[5]F. Mégret, 'Homeward Bound? Global Mobility and the Role of the State of Nationality During the Pandemic', (2020) 114 *AJIL Unbound* 322; K. A. Valenzuela-Moreno, 'Transnational Social Protection and the Role of Countries of Origin: The Cases of Mexico, Guatemala, Bolivia, and Ecuador', in V. Bravo and M. De Moya (eds.), *Latin American Diasporas in Public Diplomacy* (2021), 27.

[6]S. Onslow and L. Maguire, 'Consuls and Their Near Cousins', in S. Onslow and L. Maguire (eds.), *Consuls in the Cold War* (2023), 5; D. Mirosław, 'Legal Status of the Honorary Consul', (2014) 4 *Wroclaw Review of Law, Administration & Economics* 70.

[7]C. Green Hofstadter, 'What Consuls Do in Their Work', in C. Green Hofstadter (ed.), *Modern Consuls, Local Communities and Globalization* (2020), 31.

[8]I. B. Neumann, 'The Evolution of the Consular Institution: With Halvard Leira', in I. B. Neumann, *Diplomatic Tenses: A Social Evolutionary Perspective on Diplomacy* (2020), 26 at 27.

[9]D. C. M. Platt, *Cinderella Service: British Consuls Since 1825* (1971).

[10]1961 Vienna Convention on Diplomatic Relations, 500 UNTS 95 (hereafter VCDR, Art. 3); 1963 Vienna Convention on Consular Relations, 596 UNTS 261 (hereafter VCCR , Art. 5).

[11]See *Jadhav* Case, *supra* note 3; *Avena* Case, *supra* note 3; *LaGrand* Case, *supra* note 3; *Tehran Hostages* Case, *supra* note 4.

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work. Rather, international legal scholarship has maintained a sense that consular operations are largely a matter of national politics and bureaucracy beyond the primary concern of international law.[12] In line with this view, social science studies have sometimes approached this domain via Michael Lipsky's famous theorisation of 'street-level bureaucracy'.[13] Moreover, few insights from such empirical studies of consular work have found their way back into international law scholarship. Against this inattention, this article foregrounds those distinctive modes of international legal relation conducted by and through consular offices and officials. As this article will show, consular internationalism propagates views of the international legal plane, its key sites and actors, and relations among them that are quite distinct from, and yet entangled with, those propagated by diplomacy and public international law as traditionally conceived. This article theorizes this distinctive logic as consular internationalism.

Consular internationalism is foregrounded here for two main reasons. First, as scholars working in diplomatic history and international relations have observed, consular work is of growing significance in international affairs.[14] Demand for consular services is mounting in the face of climate change-related and other kinds of global tumult, as well as increased human mobility and an expanding array of communication channels potentially connecting states to their nationals abroad. At the same time, in-country economic inequality is intensifying globally along multiple axes, meaning that capacities for self-help that some mobile or expatriate communities have been expected to rely on in the face of peril are demonstrably falling short.[15] Attention to inequality has also engendered greater awareness of the plight of those who have never enjoyed much self-help capacity at all.[16]

Second, this article pursues a hunch that there may be unrealized possibilities for thinking about international law, and grappling afresh with its dilemmas, from a vantage point imagined to be '[s]ituated at the interface between the international [legal] system and global society',[17] as consular work often is, even as the broad range of social, economic, and legal responsibilities encompassed by the consular role problematizes the idea that 'the international [legal] system' and 'society' are separate in the first place. Possibilities for fresh thinking may be unleashed, especially, by reading consular internationalism away from its abiding historic associations with mercantilism, and more recently with neoliberalism.[18] Here, consular internationalism is read as a register of encounter that cuts across some commonplaces of diplomatic internationalism in generative, unruly, often confounding ways. Later, the metaphor of the wormhole will be introduced to capture how consular work recomposes international law's disciplinary

[12]A. Vermeer-Künzli, 'Where the Law Becomes Irrelevant: Consular Assistance and the European Union', (2011) 60 ICLQ 965, at 966.

[13]M. Lipsky, 'Toward a Theory of Street-Level Bureaucracy', (1969) *Institute for Research on Poverty Discussion Papers No. 48–69*; M. Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* (1980). For illustrative empirical studies of consular work, see M. J. Alpes and A. Spire, 'Dealing with Law in Migration Control: The Powers of Street-Level Bureaucrats at French Consulates', (2014) 23 *Social & Legal Studies* 261; F. Zampagni, 'Unpacking the Schengen Visa Regime. A Study on Bureaucrats and Discretion in an Italian Consulate', (2016) 31 *Journal of Borderlands Studies* 251; F. Infantino, 'How Does Policy Change at the Street Level? Local Knowledge, a Community of Practice and EU Visa Policy Implementation in Morocco', (2021) 47 *Journal of Ethnic and Migration Studies* 1028.

[14]See, e.g., M. Okano-Heijmans, 'Consular Affairs', in A. Cooper, J. Heine and R. Thakur (eds.), *The Oxford Handbook of Modern Diplomacy* (2013), 473 at 473–4; see Neumann, *supra* note 8, at 42.

[15]H. Hung, 'Recent Trends in Global Economic Inequality', (2021) 47 *Annual Review of Sociology* 349.

[16]See, e.g., V. Baird QC, 'Struggling for Justice: Entitlements and Experiences of Bereaved Families Following Homicide Abroad', Victims' Commissioner, 23 October 2019; IOM Regional Office for East and Horn of Africa, 'Consular, Labour Attachés, and Diaspora Collaborate to Protect Migrant Workers', 12 October 2023, available at eastandhornofafrica.iom.int/news/consular-labour-attaches-and-diaspora-collaborate-protect-migrant-workers.

[17]J. Melissen, 'Consular Diplomacy in the Era of Growing Mobility', in C. Lequesne (ed.), *Ministries of Foreign Affairs in the World: Actors of State Diplomacy* (2022), 251 at 251.

[18]See, e.g., S. A. Simeonov, 'Jacksonian Consular Reform and the Forging of America's First Global Bureaucracy', (2021) 33 *Journal of Policy History* 401; A. Tsinovoi and R. Adler-Nissen, 'Inversion of the "Duty of Care": Diplomacy and the Protection of Citizens Abroad, from Pastoral Care to Neoliberal Governmentality', (2018) 13 *The Hague Journal of Diplomacy* 211.

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architecture. This is the case notwithstanding that consular work is frequently subservient to state power and remains deeply implicated in global hierarchies.

The argument of this article is that consular internationalism is a richer resource for thought and practice in international law than commonly acknowledged, especially for analyzing historical and contemporary entanglements of imperial and commercial power; for grappling with the role of lay people and multifarious, unsanctioned communities in shaping international legal order; and potentially for supporting anti-domination struggles. The laws and practices of consular internationalism reveal a great variety of individuals and sub-national and transnational communities engaging in juris-generative encounters on the international plane (that is, encounters that produce or shape legal relations internationally). That is the case notwithstanding international law's enduring commitment to reserving law-making authority to states, international organizations and adjacent elites. Consular practice also evidences highly uneven distribution of that juris-generative capacity. Those with the means to cross borders, and to leverage surrounding claim-making infrastructures – social media platforms as much as courts – are best positioned to work through the wormholes that consular internationalism punches through international legal order, while many have little prospect of doing so. This unevenness is not new, but it now bears upon international legal relations in arguably more influential ways. This suggests that international legal scholars would do well to attend more closely to the ambivalent attachments, compound inequalities, and hybrid forms of power that consular internationalism manifests.

This argument holds potential significance beyond the reach of international law scholarship ordinarily concerned with consular and diplomatic work. It re-enlivens the question of how international law relates to 'ordinary' people and the demotic – probing international law's profound ambivalence on this front.[19] The question of how international law should relate to lay people or people *en masse* is a question with which a very wide array of international legal scholarship is concerned, including scholarship on self-determination,[20] transitional justice,[21] populism,[22] public engagement,[23] and revolutions.[24] This article poses this question afresh through a focus on prevailing international legal doctrines and practices: an approach informed by practice theory and recent theorization of legal technique.[25] Through this lens, it casts international legal order as far more dependent on iterative sign-on (that is, on its ability to attract recurrent affirmation, which is not assured), and its hierarchies more ubiquitously contested, than international legal scholarship typically allows. In other words, it suggests that international legal order does not just endure insofar as states say so. Its persistence is contingent on all sorts of people's continual endorsement and deference.

This engages, also, long-running debates in international legal scholarship concerning when, where, and how experiences of indeterminacy are produced in international legal work, and how

[19]Scholars and practitioners of international law often characterize the legitimacy of international laws and legal institutions as dependent on 'relevance' or responsiveness to colloquial concerns and emphasize the imperative of state leaders being answerable to the needs and views of their people. This suggests a positive relationship between international law and 'ordinary people'. At the same time, international lawyers experience many kinds of popular political movement or uprising as threats to international law (i.e., populism, insurgency, mass protest, and their like). This is the 'profound ambivalence' to which I am referring, different dimensions of which are explored in the works cited at notes 20–24, *infra*.

[20]See, e.g., W. G. Werner, 'Self-Determination and Civil War', (2001) 6 *Journal of Conflict and Security Law* 171.

[21]See, e.g., M. Mutua, 'What Is the Future of Transitional Justice?', (2015) 9 *International Journal of Transitional Justice* 1.

[22]See, e.g., C. Schwöbel-Patel, 'Populism, International Law and the End of Keep Calm and Carry on Lawyering', in J. E. Nijman and W. G. Werner (eds.), *Netherlands Yearbook of International Law 2018: Populism and International Law* (2019), 97.

[23]See, e.g., M. Chiam, *International Law in Public Debate* (2021).

[24]See, e.g., K. Greenman et al. (eds.), *Revolutions in International Law: The Legacies of 1917* (2021).

[25]T. R. Schatzki, K. K. Cetina, and E. von Savigny (eds.), *The Practice Turn in Contemporary Theory* (2001); A. Riles, 'A New Agenda for the Cultural Study of Law: Taking on the Technicalities', (2005) 53 *Buffalo Law Review* 973; R. Michaels and A. Riles, 'Law as Technique', in M. Foblets et al. (eds.), *The Oxford Handbook of Law and Anthropology* (2020), 860.

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such experiences are quelled or circumvented.[26] Borders between states are among those sites at which international law is experienced by many at its most determinate and determinative. As Yaoundé and Tunis have observed, 'visa applicants generally have little scope to negotiate, influence, or challenge the discretionary powers of consular staff' or their interpretations of migration law at international legal borders.[27] Nonetheless, this article highlights the array of material, doctrinal, and discursive investments required to maintain the determinacy of borders and related distinctions among people, suggesting that international legal determinacy is not easy to sustain. The study of consular internationalism can help expand understanding of how some classifications on the international legal plane come to be experienced as indeterminate or negotiable, and how such experiences get ruled out.

The porousness of classifications routinely made in international law continually resurfaces in consular work. This article will later show how this porousness pervades relevant international legal doctrine, just as other scholars' empirical studies have highlighted how consular classifications get challenged in practice.[28] And this permeability is not, for the most part, an effect of human rights law as some scholars suggest.[29] Rather, this article argues, it is an effect of the irreducible ambivalence to which consular internationalism gives expression. The wager of this article is that foregrounding this consular register in international law, and struggles ongoing in this register, may make this ambivalence more leverageable, in the context of growing migration inequality,[30] by those against whom worldly odds seem most stacked.

To advance this argument, Section 2 introduces the distinctiveness of consular internationalism, as expressed in the VCCR, in contrast to the diplomatic internationalism enshrined in the VCDR. The aim of this comparison is to specify the internationalist optic that consular work engenders in an ideal type.[31] Section 3 examines how this consular internationalist optic has been shaped and reshaped by national and international courts' renderings of consular work, as well as community contestation of that state practice, illustrated by litigants' efforts in various jurisdictions to subject consular decision-making to judicial review. Section 4 draws out the distinctive theorization of international law that emerges from consular internationalism, employing the motif of wormholes to suggest how consular work both spans and scrambles received classifications of authority in international law.[32] Section 5 concludes by reflecting on the possibilities and problems that may be associated with international lawyers approaching the international legal plane through the lens of consular internationalism.

[26]D. Kennedy, *International Legal Structures* (1987); M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Revised ed., 2006). On indeterminacy as an experience, not a property of legal materials, see D. Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenology', (1986) 36 *Journal of Legal Education* 518.

[27]See Alpes and Spire, *supra* note 13, at 264.

[28]See, e.g., S. Scheel, *Autonomy of Migration? Appropriating Mobility Within Biometric Border Regimes* (2019) (showing how migrants 'appropriate' mobility in the face of biometric border controls).

[29]Cf. D. P. Stewart, 'The Emergent Human Right to Consular Notification, Access and Assistance', in A. von Arnauld, K. von der Decken and M. Susi (eds.), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (2020), 439.

[30]M. McAuliffe et al., 'Growing Migration Inequality: What Do the Global Data Actually Show?', (2024) *World Migration Report*.

[31]M. Weber, *The Methodology of the Social Sciences* (Edward Shils translation, 1949) at 90–2 ('An ideal type is formed . . . by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent *concrete individual* phenomena . . . into a unified *analytical* construct . . . [that] cannot be found empirically anywhere in reality . . . ' (emphasis in original)).

[32]On wormholes in science, vermiculture, and fiction, see N. Taylor Tillman and A. Harvey, What Are Wormholes?', *Space*, 5 March 2024, available at www.space.com/20881-wormholes.html; M. S. Morris and K. S. Thorne, 'Wormholes in Spacetime and Their Use for Interstellar Travel: A Tool for Teaching General Relativity', (1988) 56 *American Journal of Physics* 395; C. A. Edwards, N. Q. Arancon and R. L. Sherman (eds.), *Vermiculture Technology: Earthworms, Organic Wastes, and Environmental Management* (2010); J. Fowles, *Wormholes: Essays and Occasional Writings* (2010).

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2. A tale of two internationalisms: Diplomatic and consular

In international legal doctrine and scholarship, diplomatic and consular affairs have often been addressed in tandem, as indicated by the structural parallels between the VCDR and the VCCR, their paired provenance in the work of the International Law Commission, and frequent coupling in scholarly commentary.[33] There are, nonetheless, important distinctions in how these two Conventions respectively depict and approach the international legal plane, and there is much at stake in whether a diplomatic or consular optic is adopted in any particular matter. These distinctions are the focus of this section. Its aim is not to retell stories told by international relations and diplomatic history scholars elsewhere about the history of the consular institution, but rather to make international legal scholars aware of some of these stories' main threads, connect them to features of international law doctrine, and consider their ramifications for international legal work.

2.1. Diplomatic internationalism

Diplomatic internationalism conforms, in many ways, to internationalism as public international lawyers have typically approached it. As James Crawford observed, 'diplomacy comprises any means by which states establish or maintain mutual relations, communicate with each other, or carry out political or legal transactions, in each case through their authorized agents', irrespective of whether the states concerned are embroiled in 'material forms of economic or military conflict'.[34] What is most telling in Crawford's characterization of diplomacy is the emphasis placed on mutuality of recognition between states concerned, and the channelling of their relations through authorized agents. Also noteworthy is the fact that diplomacy may continue notwithstanding intense, even violent conflict between the states concerned, implying that diplomatic discourse and violence proceed on entirely separate tracks (despite ample historical evidence to the contrary).[35]

The international legal order evoked by diplomacy is, accordingly, one dominated by states envisioned in relations of formal inequality, with those relations conducted through designated representatives organized by rank. Such an international legal order must allow for the isolation of high-level state agents' interactions from 'economic or military conflict' ongoing besides. In other words, diplomatic internationalism is a multi-channel, dissonant affair, with diplomacy reserved for that channel that is 'at the most formal end of the spectrum of international communication' for which international law provides.[36] Just as diplomacy is imagined to be separable from violence, so it is envisioned to be distinguishable from economic conflict. For this sense of multi-modal relation to be sustained, and for diplomacy to occupy a distinct, rarefied register within it, the international legal plane must be stratified, and its stratification continually defended.

The work of diplomacy has, of course, come to encompass all sorts of international relations beyond and between traditional channels of formal, interstate relation: public diplomacy, for instance.[37] And states' international legal rights of diplomatic protection engage with the predicaments of individual natural and legal persons.[38] Nonetheless, stratification remains crucial to diplomacy. Diplomacy 'proper' is typically confined to affairs of state and reserved to a

[33]International Law Commission (ILC), Report of the International Law Commission Covering the Work of Its Twelfth Session (25 Apr.–1 July 1960), Doc. A/4425, A/CN.4/132 (1960), at 145, para. 15; J. Wouters, S. Duquet and K. Meuwissen, 'The Vienna Conventions on Diplomatic and Consular Relations', in Cooper, Heine and Thakur, *supra* note 14, 510.

[34]J. Crawford, *Brownlie's Principles of Public International Law* (2012), 395.

[35]See, e.g., R. H. Holden, 'The Real Diplomacy of Violence: United States Military Power in Central America, 1950–1990', (1993) 15 *The International History Review* 283.

[36]Ibid.

[37]J. Melissen, 'Public Diplomacy', in Cooper, Heine and Thakur, *supra* note 14, 436.

[38]ILC Draft Articles on Diplomatic Protection, Sixty-first Session, Supplement No. 10, A/61/10 (2006); see generally C. A. Casey, *Nationals Abroad: Globalization, Individual Rights, and the Making of Modern International Law* (2020).

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privileged class of persons (privileged in the sense of being historically dominated by aristocrats and property-holders as well as enjoying legal privileges and immunities specified by the VCDR).[39] Meanwhile, public diplomacy and other modes of diplomacy that revolve around engaging with the 'common people' are often seen as lower-status forms of diplomatic work, reserved for those in the nether ranks of diplomatic hierarchies or working at its semi-official peripheries.[40] Diplomatic internationalism is, accordingly, class-based internationalism in multiple senses of that term. Given this propensity for diplomacy to stratify, it is unsurprising that practices and pedagogies of diplomacy have lent heavily, historically, on the mores of the upper classes,[41] or that diplomatic institutions have been an explicit focus of class struggle.[42]

This stratified, state-oriented internationalist optic is both expressed in and defended by the VCDR.[43] That Convention provides for diplomatic relations to be established between states 'by mutual consent'.[44] It anticipates diplomatic missions performing a range of state-directed functions including 'negotiating with the Government of the receiving state'.[45] The VCDR requires the head of a diplomatic mission to be accredited with each state receiving that mission, subject to that receiving state's agreement, while the staff of the mission may be 'freely appoint[ed]' by the sending state.[46] It divides heads of mission into three classes, establishes an order of precedence among these heads in their respective classes, and anticipates other diplomatic staff being similarly ranked at the direction of their head of mission.[47] The VCDR links diplomatic privileges explicitly to state territory by focusing attention on diplomats' 'arriv[al] in the territory of the receiving state' and departure from it, providing for diplomats' accommodation on that state's territory, and their freedom of movement within that territory, as well as extending diplomatic inviolability to those transiting through third state territory.[48]

In all these ways, the diplomatic internationalism enshrined in the VCDR is characterized by relative closure, parallelism, and hierarchy. Diplomacy does not entail reconciling all differences; it does not expect or require that participants hold the same worldviews, for instance. Rather, diplomacy 'folds' international differences into formality and hierarchy, to both maintain the irreconcilable within the international sphere and contain its effects.[49] In the international law of diplomacy, international lawyers approach the world via carefully patrolled relations of rank, maintaining stubborn insistence on the separateness of economics from politics, and discourse from violence, as shown in this section. In other words, diplomacy revolves around conservation of the contradictions that international law embeds in state sovereignty: in the combination of states' formal legal equality with inter-state hierarchy in fact and in law (for instance, in the UN Security Council); and the conjunction of international legal commitments to self-determination with the manifest anti-pluralism apparent in international law's prioritization of the interests of

[39]R. Jones, 'The Social Structure of the British Diplomatic Service, 1815–1914', (1981) 14(27) *Histoire sociale/Social History* 49.

[40]E.g., D. M. Faris, 'From the Age of Secrecy to the Age of Sharing: Social Media, Diplomacy, and Statecraft in the 21st Century', in S. Kalathil (ed.), *Diplomacy, Development and Security in the Information Age* (2013), 35 at 40 ('Influencing the influencers means building horizontal networks of trust and reciprocity between lower-level members of the [diplomatic] hierarchy . . . It means understanding that a third level has been added to the diplomatic game.').

[41]K. Huju, 'The Cosmopolitan Standard of Civilization: A Reflexive Sociology of Elite Belonging Among Indian Diplomats', (2023) 29 *European Journal of International Relations* 698.

[42]L. Frey and M. Frey, '"More Savage than White Bears": The Diplomatic Etiquette of Revolutionary France', (2017) 22 *The Court Historian* 53; O. Zakharova, 'The Regulatory Framework of the Soviet Diplomatic Protocol. History of Formation', (2020) 2 *Krakowskie Studia Małopolskie* 150.

[43]See VCDR, *supra* note 10.

[44]Ibid., Art. 2.

[45]Ibid., Art. 3.

[46]Ibid., Arts. 4–7.

[47]Ibid., Arts. 14–17.

[48]Ibid., Arts. 9, 10, 21, 26, 40.

[49]A. Gramsci, *Prison Notebooks*, Vol. 3 (J. A. Buttigieg translation, 2011), 91, 439 (quoting Georges Clemenceau observing that the word diplomat has an etymological root in the word 'double' in the sense of 'to fold').

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existing territorial states (in the principle of *uti possidetis*, for example).[50] Whereas diplomatic internationalism cultivates studied inattention to these contradictions while sustaining them, consular internationalism works with and through them, sometimes wedging them open.

2.2. Consular internationalism

Consular histories are 'winding and often confusing'; unlike diplomacy, consular work has never been associated with 'a specific way of "being-in-the-world" ... instantly recognizable by other consuls', although consular personnel do maintain 'communities of practice'.[51] Nonetheless, consular institutions encountered today – typically part of unitary national foreign services, alongside diplomatic corps and ministries of foreign affairs – have a genealogy quite distinct from these services' other arms.[52]

The consular office has frequently been dated to the work of *proxeni* (residents of one city-state employed by another to receive dignitaries, collect information and facilitate trade) and *prostatai* (intermediaries between the polis and foreigners living within it) in Ancient Greece, and later to the Roman office of *praetor peregrinus* (charged with settling disputes between citizens and foreigners).[53] Whether from these beginnings or others, the consular office is traceable to the phenomenon of expatriate communities, especially traders, selecting or electing, from among their own, certain persons charged with mediation among distinct communities.[54] These persons' partisan, communal mandates expanded over time so that consuls (or consul-equivalents) became not just magistrates or fixers for diasporic polities but their 'fully-fledged leader[s]' charged with wide-ranging responsibilities.[55] Throughout the Middle Ages, the consular role became more differentiated and specialized.[56] Then from the thirteenth century onwards, sovereigns started to assume greater responsibility for consular appointment.[57] Between the seventeenth and nineteenth centuries, the consular institution was largely absorbed into the architecture of nation states, whereupon it was generally subordinated to its diplomatic counterpart.[58] This subordination is indicated, for example, in the VCDR's allowance for diplomatic missions to perform consular functions, treating consular work as a subset of diplomatic work.[59] Since their absorption into state-based international legal order, consular offices have been partially delinked from these histories of communal appointment and attachment, but not entirely so. Well into the nineteenth century, and even today, consular work remains city-based to a significant degree.[60]

The statist takeover of consular work; the residue of consular officials' partisan allegiances; and allowance for the partial privatization of consular work (with commercial outsourcing of consular

[50]G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004), at 352.

[51]H. Leira and I. B. Neumann, 'The Many Past Lives Of The Consul', in J. Melissen and A. M. Fernández (eds.), *Consular Affairs and Diplomacy* (2011), 225 at 225–46, 227, 230. See, e.g., Platt, *supra* note 9; L. Müller, *Consuls, Corsairs, and Commerce: The Swedish Consular Service and Long-Distance Shipping, 1720–1815* (2004). On communities of practice, see Infantino, *supra* note 13.

[52]B. Hocking (ed.), *Foreign Ministries: Change and Adaptation* (1999); C. Lequesne, 'Ministries of Foreign Affairs: A Crucial Institution Revisited', (2020) 15 *The Hague Journal of Diplomacy* 1.

[53]J. I. Puente, 'The Nature of the Consular Establishment', (1930) 78 *University of Pennsylvania Law Review and American Law Register* 321; AJIL, 'Supplement: The Legal Position and Functions of Consuls', (1932) 26 AJIL 193, at 202–12; see Leira and Neumann, *supra* note 51.

[54]See Neumann, *supra* note 8.

[55]Ibid., at 32.

[56]See Leira and Neumann, *supra* note 51.

[57]Ibid.

[58]Ibid.; see AJIL, *supra* note 53, at 202–7.

[59]See VCDR, *supra* note 10, Art. 3.

[60]H. Leira and B. de Carvalho, 'The Intercity Origins of Diplomacy: Consuls, Empires, and the Sea', (2021) 3 *Diplomatica* 147.

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functions having recently grown) are all apparent in the VCCR.[61] Concluded in 1963, the VCCR reflected an aspiration that forces of mercantile ambition, community connection, and private partisanship might be both tamed and tapped by international law, while being stripped of their fragmentary potential. Instead, consular work was cast diminutively in the VCCR as the servicing of peoples' and firms' daily needs, and by extension, those of global markets.

Article 38 of the VCCR makes this servile framing apparent, stipulating that consular offices may only address the 'central authorities of the receiving state if and to the extent that this is [expressly] allowed'; otherwise, they ordinarily only 'address . . . the competent local authorities of their consular district'.[62] This is combined, nevertheless, with the expectation, set out in Article 5(c), that consular officials should ascertain 'conditions and developments in the commercial, economic, cultural and scientific life of the receiving state' and report 'thereon to the Government of the sending state and . . . persons interested'.[63] Together, these provisions give consular internationalism a sense of being closer to the proverbial street than diplomatic internationalism, and valued for the insights that such proximity yields.

Reflecting these street-level attachments, consular internationalism is presented in the VCCR as a relatively modest, mundane affair: less a matter of high-stakes inter-sovereign negotiation than one of people showing up bearing the right paperwork. This is reflected, for instance, in processes of consular appointment. Whereas the VCDR provides for a sending state to 'accredit' diplomats formally with a receiving state, as noted above, the VCCR anticipates the head of a consular post simply being given 'a document, in the form of a commission or similar instrument' certifying their capacity, which shall concurrently be 'transmit[ted]' through diplomatic or other appropriate channels.[64]

Consular internationalism is also more piecemeal in its territorial arrangements than diplomatic internationalism. Cities, provinces, and regions have long been engaged in consular work, and do so to this day, especially but not only in federal states.[65] In recognition of this, the representative competence entrusted to a consular official in the VCCR is not isomorphic with the territory of a nation state. Rather, a consular post is attached to a designated 'consular district'.[66] Moreover, the VCCR provides for a consular official to serve more than one sending state within that district.[67] And state or public service need not be the consular official's sole pursuit. Consular officials may carry on 'any private gainful occupation in the receiving state', Article 57 allows, although '[c]areer consular officers shall not carry on for personal profit any professional or commercial activity in the receiving state'.[68]

In all these ways, the VCCR arranges the international legal field in quite different configurations to those sketched by the VCDR. In contrast to the singular state devotion and whole-of-self-and-state coherence generally presupposed by the VCDR, [69] the VCCR holds open space for ambivalent relations and multiple allegiances: space cross-hatched by the patchwork of bilateral agreements and regional agreements on consular relations.[70] As Leira and Neumann have observed, the 'consular jurisdiction has the particular character of being domestic and

[61]F. Infantino, *Outsourcing Border Control: Politics and Practice of Contracted Visa Policy in Morocco* (2017).

[62]See VCCR, *supra* note 10, Art. 38.

[63]See VCCR, *supra* note 10, Art. 5.

[64]See VCDR, *supra* note 10, Arts. 4–5; VCCR, *supra* note 10, Arts. 4–5, 11.

[65]Such sub-national entities engage in diplomacy too, but are typically subject to national override in diplomatic relations. R. Tavares, *Paradiplomacy: Cities and States as Global Players* (2016), at 47.

[66]See VCCR, *supra* note 10, Arts. 4, 6, 14.

[67]Ibid., Art. 18.

[68]Ibid., Art. 57.

[69]F. Johns, 'Rehoming Diplomacy: Privilege and Possibility in the International Law of Diplomatic Relations', (2024) 74 *University of Toronto Law Journal* 69, 74–7.

[70]L. T. Lee and J. Quigley, *Consular Law and Practice* (2008); 1967 European Convention on Consular Functions, ETS No. 61; 1975 Inter-American Convention on Letters Rogatory, OAS Treaty Series No. 43 (1975).

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international at the same time'.[71] It also straddles the governance modes of *imperium* (rule characteristic of sovereigns) and *dominium* (rule characteristic of property-holders).[72] Koskenniemi notes that the exercise of consular jurisdiction has served as a relatively low-cost mode of extending imperial rule.[73] Nonetheless, consular work in the service of state sovereignty has always been 'superimposed upon [the consular jurisdiction's] commercial character', evoking the power of *dominium* as well.[74] While, as argued above, diplomatic internationalism tends to paper over sovereignty's contradictions, consular internationalism invites those contradictions' periodic reopening. Maïa Pal's study of the social backgrounds and work of seventeenth century Dutch, French, and English consuls in the Mediterranean vividly illustrates this polyvalence.[75] This multiplicity has troubled efforts to render the exercise of consular jurisdiction judicially reviewable, as Section 3 will show.

3. Legalising consular internationalism?

Persons that are the focus of consular attention, or solicit that attention, are often in dire straits. Some face death. Others seek permission to travel or work, or to have some legal status or instrument certified: matters in which they are often deeply invested. In view of this, it is unsurprising that those disappointed by consular decision-making have often sought recourse under national law, including from domestic courts. Also, clarification has been sought from international courts of the international legal consequences of states' decisions whether to provide consular assistance.[76] Consular internationalism has been shaped, in part, by courts' responses to such applications.

This section selectively surveys some national legal developments on this front, and to a lesser extent some corresponding international and regional developments. Its aim is to show how much struggle is involved in upholding divides long axiomatic to the international legal order, such as that between law and politics – struggle manifest recurrently in the consular domain. Courts in the jurisdictions examined here have mostly managed to reserve consular decision-making to sovereign prerogative. Yet this prerogative has nonetheless faced challenge under international and regional human rights law, and under the administrative law, constitutional law, and citizenship law of various states. Australia, China, Mexico, South Africa, the United Kingdom, and the United States are the focus here, chosen to convey a sense of the diversity of legal, political, and economic systems in which provocations of this kind have been apparent. Notably, EU member states are mostly absent from this part, even as developments in EU law and policy have significantly affected the provision of consular assistance, because of the sizeable volume of scholarship already surveying those developments.[77]

[71]See Leira and Neumann, *supra* note 51, at 226.

[72]J. Desautels-Stein, 'Imperium and Dominium', in J. Desautels-Stein (ed.), *The Right to Exclude: A Critical Race Approach to Sovereignty, Borders, and International Law* (2023), 25.

[73]M. Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power, 1300–1870* (2021), at 790–4.

[74]J. I. Y. Puente, 'Functions and Powers of the Foreign Consulate: A Study in Medieval Legal History', (1944) 20 *New York University Law Quarterly Review* 57, at 57.

[75]M. Pal, 'Consuls', in M. Pal, *Jurisdictional Accumulation: An Early Modern History of Law, Empires, and Capital* (2020), 194.

[76]*The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law,* Advisory Opinion OC-16/99 Requested by the United Mexican States of 1 October 1999, [1999] Inter-American Court of Human Rights.

[77]See, e.g., Vermeer-Künzli, *supra* note 12; E. Csatlós, 'European Administration of Consular Protection', (2022) 2 *Institutiones Administrationis – Journal of Administrative Sciences* 114; E. Csatlós, 'The EU's Consular Protection Policy from the Administrative Law Perspective', (2020) 18 *Central European Public Administration Review* 185; S. Battini, 'The Impact of EU Law and Globalization on Consular Assistance and Diplomatic Protection', in E. Chiti and B.G. Mattarella (eds.), *Global Administrative Law and EU Administrative Law: Relationships, Legal Issues and Comparison* (2011), 173.

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As public resources in many parts of the world have been straitened (in connection with austerity policies, tax base erosion, debt burdens, emigration, and rising disaster relief, health, and social security costs), states have become increasingly dependent on their nationals for the advance of states' economic and security interests globally.[78] For these and other reasons, recent decades have seen states forge a greater array of legal and policy links to diasporic communities.[79] Even so, states have remained selective in their willingness to extend the 'watchful eye and . . . strong arm' of consular protection to their nationals, and similarly selective in which non-nationals they are willing to admit to their territories.[80] This selectiveness has prompted a range of communities and individuals to argue, before national courts, for the expansion of states' consular responsibilities – including plaintiffs that might otherwise have been circumspect about expanding state power. Those who do take to court (or the court of public opinion) to argue for an expanded aegis of consular authority are often unruly state surrogates, frequently arguing for state support of historically marginalized citizens such as those tagged as terrorists, migrants, and asylum seekers. This lends consular internationalism a significant degree of fractiousness.

Appeals for consular assistance potentially engage two forms of legal right on the part of a state.[81] One of these is a state's right, under public international law, to exercise diplomatic protection, vis-à-vis another state, protesting the latter's treatment of a natural or legal person that is a national of the plaintiff state, as if the harm done to that national were an offense against the state of nationality. In exercise of this right, a state may present an international claim in such forums, and/or take such remedial actions against the alleged offender state, as public international law allows. The second is a right of a state, under national law, to discharge its national administrative functions on foreign territory by providing its nationals on that territory with consular assistance, or processing visa applications from foreign nationals, within the limits of extraterritorial jurisdiction recognized by public international law.

Diplomatic protection is a right opposable to other states on the international legal plane, whereas consular protection is principally an extension of states' executive power under national law.[82] Nevertheless, in practice they are frequently entangled. Requests for consular assistance may entail requests for diplomatic protection, and exercise of the latter will often involve consular offices. Such requests may also proceed alongside pleas for a state to bear international legal responsibility for unlawful, extraterritorial state action – arguments that may follow from the fact of states having provided consular support.[83] Similarly, states' responses to pleas for diplomatic or consular protection from nationals abroad may sometimes be bound up with the extraterritorial exercise of jurisdiction at the state's own behest on grounds of nationality or passive personality.[84]

[78]O. Anastasakis et al. (eds.), *Diaspora Engagement in Times of Severe Economic Crisis: Greece and Beyond* (2022).

[79]L. Pedroza and P. Palop-García, 'Diaspora Policies in Comparison: An Application of the Emigrant Policies Index (EMIX) for the Latin American and Caribbean Region', (2017) 60 *Political Geography* 165. This is a variant of what Benton and Ford call 'vernacular constitutionalism': L. Benton and L. Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800–1850* (2017).

[80]See Koskenniemi, *supra* note 73, at 790 (quoting Lord Palmerston insisting, in 1850, that 'a British subject, in whatever land he may be, shall feel confident that the watchful eye and the strong arm of England will protect him from injustice and wrong').

[81]A. Künzli, 'Exercising Diplomatic Protection: The Fine Line Between Litigation, Demarches and Consular Assistance', (2006) 66 ZaöRV 321, at 331–2.

[82]See Battini *supra* note 77, at 176. See also *R v. Secretary of State ex parte Ferhut Butt*, UK Court of Appeal (Civil Division), FC3 99/6610/4, 116 ILR 607 (9 July 1999).

[83]G. Goodwin-Gill, 'The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations', (2007) 9 *University of Technology Sydney Law Review* 26; R. McCorquodale and P. Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law', (2007) 70 *Modern Law Review* 598.

[84]M. T. Kamminga, 'Extraterritoriality', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2020), 1070.

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The laws of 'most countries' do not afford nationals substantive legal entitlements to receive consular assistance or diplomatic protection, nor allow states' consular decision-making in these matters to be judicially reviewed, instead deferring to sovereign or executive prerogative.[85] Germany's Law on consular officers is sometimes singled out as 'exceptional' in this regard because it stipulates that consular officers shall provide German nationals with assistance when they need help, and that need cannot be addressed otherwise.[86] This requirement is, however, explicitly subject to consular officers' discretionary assessment of necessity.[87] As this section will convey, the laws of Australia, China, Mexico, South Africa, the United Kingdom, and the United States generally uphold sovereign prerogative in this area. Nonetheless, as we shall also see, there are important variations among them, and there have been some shifts away from that deference in the face of community challenge. Controversy has surrounded states' consular handling of foreigners' claims (in visa processing for instance) and states' consular protection of their own nationals abroad; both kinds of dispute are canvassed in this section.

Australian federal courts' constitutionally protected role in reviewing the legality of governments' administrative action extends, in principle, to action in the consular sphere.[88] Such review may be limited, however, by the common law act of state doctrine precluding Australian courts from judging the legality of acts of a foreign government done within that foreign state's own territory.[89] Judicial review of consular decision-making potentially falls foul of this doctrine insofar as it demands judgement on the kind of peril faced by Australian nationals abroad. Australian courts' review of consular decision-making is also circumscribed by the potentially more far-reaching common law doctrine of non-justiciability.[90] That doctrine rules out of bounds certain issues deemed inherently unsuitable for judicial determination, including the propriety of executive action in the sphere of foreign affairs, except to the extent necessary to resolve a justiciable issue.[91]

In line with the tenor of these doctrines, Australian governments facing citizens' pleas to intercede with foreign states on their behalf, or arrange their repatriation, have strenuously denied any legal duty to make a decision on such matters, a position endorsed by the courts.[92] This is made clear in the Australian Federal Government's Consular Services Charter.[93] In cases involving Australian citizens detained on counter-terrorism grounds abroad, judges have nonetheless shown some willingness to entertain the question whether governmental refusal to *consider* pleas of this

[85]M. Okano-Heijmans, 'Changes in Consular Assistance and the Emergence of Consular Diplomacy', in Melissen and Fernández, *supra* note 51, 21 at 26.

[86]Ibid.

[87]Gesetz über die Konsularbeamten, ihre Aufgaben und Befugnisse (Konsulargesetz) [Law on consular officers, their functions and powers] 1974 Bürgerliches Gesetzbuch [BGB] [Civil Code] I p. 2317, as amended by article 20b of the law of March 28, 2021 Bürgerliches Gesetzbuch [BGB] [Civil Code] I p. 591, s §§ 1, 5(1). The State's discretionary right to exercise diplomatic protection or not was confirmed by Germany's Federal Constitutional Court in *Hess-Entscheidung*, 1980, Bundesverfassungsgericht [BVerfGE 55], reproduced in 90 ILR 386 (1992).

[88]*Bank of NSW v. Commonwealth* (1948) 76 CLR 1 at 363 per Dixon J.

[89]*Potter v. Broken Hill Proprietary Co Ltd* (1906) 3 CLR 479; *Attorney-General (UK) v. Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30; *Petrotimor Companhia de Petroleos SARL v. Commonwealth of Australia* (2003) 126 FCR 354.

[90]*Re Ditfort, ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347; *Moti v. The Queen* [2011] HCA 50, (2011) 245 CLR 456.

[91]R. Thwaites, 'The Changing Landscape of Non-Justiciability', (2016) 2016 *New Zealand Law Review* 31.

[92]*Habib v. Commonwealth (No 2)* (2009) 175 FCR 350; *Save the Children Australia v. Minister for Home Affairs* [2023] FCA 1343.

[93]Consular and Crisis Management Division, Australian Department of Foreign Affairs and Trade, 'Consular Services Charter', available at www.smartraveller.gov.au/consular-services/consular-services-charter.

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kind is consistent with Australian administrative law.[94] This is a direction encouraged by the International Law Commission's 2006 Draft Articles on Diplomatic Protection that set out a 'recommended practice' that a state should 'give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred' and 'take into account, wherever feasible, the views of injured persons'.[95] At the time of writing, a committee of the Australian Parliament was conducting an inquiry into Australia's approach to the wrongful detention of citizens overseas.[96] Meanwhile, in Australian migration law, judicial oversight of consular work of visa issuance has been legislatively curtailed to a significant degree, prompting countervailing judicial rulings aimed at protecting those subject to Australian government jurisdiction from arbitrary decision-making.[97]

In China, too, consular protection holds growing political significance for the Chinese Communist Party as it expands its international investments and increasingly treats the security of its citizens abroad as core to its national security.[98] China maintains a vast network of consular offices worldwide fielding an immense number of requests for consular assistance.[99] Responsibility for consular protection is operationally decentralized in China, albeit under central governmental and party rule. All provincial governments have their own foreign affairs departments. Regulations issued by China's Ministries of Foreign Affairs, Commerce, and Labour and Social Security, jointly and respectively, require companies sending workers abroad to assume primary responsibility for ensuring their safety, with local authorities where such companies and/or relevant households are registered charged with sharing that responsibility. This lends consular work a multi-scalar, hybrid quality. The Chinese military has been actively engaged too in evacuating Chinese citizens abroad. And quasi-governmental organizations such as Chinese chambers of commerce routinely provide security services abroad for their members.[100] Consequentially, judicial review of the consular protection that Chinese citizens enjoy is oriented towards enforcement of the obligations of employers and labour brokers towards Chinese workers whom they send abroad.[101] Chinese courts do not enjoy the independence from political organs that would allow for the state's decision-making in this high-stakes domain to be subject to judicial scrutiny at citizens' motion. Occasional media reports of discontent among Chinese citizens with consular assistance afforded them have been firmly discredited by the state.[102] As far as consular handling of foreign migrants, the decisions of Chinese state authorities on visa issues are not subject to judicial review under Chinese law.[103]

[94]*Hicks v. Ruddock* (2007) 156 FCR 574 (interim ruling on application for summary judgment per Tamberlin J); *Habib v. Commonwealth (No 2)* (2009) 175 FCR 350 at [50] and [61]-[68] (Perram J).

[95]See ILC, *supra* note 38, Art. 19.

[96]Senate Standing Committee on Foreign Affairs, Defence and Trade Committee, 'Wrongful Detention of Australian Citizens Overseas', available at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/WrongfulDetention47.

[97]G. R. Hooper, 'Three Decades of Tension: From the Codification of Migration Decision-Making to an Overarching Framework for Judicial Review', (2020) 48 *Federal Law Review* 401.

[98]L. Xia, 'Consular Protection with Chinese Characteristics: Challenges and Solutions', (2021) 16 *The Hague Journal of Diplomacy* 253, at 256; E. Barabantseva and T. Wang, 'Diaspora Policies, Consular Services and Social Protection for Chinese Citizens Abroad', in J.-M. Lafleur and D. Vintila (eds.), *Migration and Social Protection in Europe and Beyond (Volume 3): A Focus on Non-EU Sending States* (2020), 93.

[99]See Barabantseva and Wang, ibid., at 97.

[100]See Xia, *supra* note 98, at 260–71.

[101]A. Halegua and X. Ban, 'Labour Protections for Overseas Chinese Workers: Legal Framework and Judicial Practice', (2020) 8 *The Chinese Journal of Comparative Law* 304.

[102]See, e.g., Chinese Foreign Ministry, 'Consular Protection of the Chinese Citizen in Libya –Foreign Ministry Spokesperson's Office', 19 January 2007, available at is.china-embassy.gov.cn/eng/fyrth/200701/t20070119_2718907.htm.

[103]B. Ahl and P.-P. Czoske, 'The Reform of Chinese Migration Law and the Protection of Migrants' Rights', in G. Schubert, F. Plümmer and A. Bayok (eds.), *Immigration Governance in East Asia: Norm Diffusion, Politics of Identity, Citizenship* (2020), 179 at 190.

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The expansive network of support that China affords its citizens abroad is not unique. Since the late 1980s, Mexico has been something of a trailblazer in the delivery of socio-legal support to its citizens abroad via its network of consulates and consular protection officers, especially in the United States.[104] This has been, in significant part, an effect of the 'assertive and strategic actions of migrants' leveraging ties to their country of origin to counter obstacles to claim-making in their respective countries of residence.[105] In the wake of global economic restructuring, emigrants from Mexico came to be 'not only valued as remittances senders, but also as bearers of human and social capital useful to the development of origin countries', affording emigrant communities 'some leverage in negotiating with their countries of origin'.[106] Accordingly, the Mexican Foreign Service Act provides that consular agents must 'afford the widest possible protection of the rights of Mexican nationals abroad' and that heads of consular posts must 'protect, within their corresponding consular districts, the interests of Mexico and the rights of Mexican nationals under international law'.[107] Ensuing regimes of consular protection span soft and hard law, including, for example, a memorandum of understanding between Chicago's Mexican Consulate and the Illinois Department of Child and Family Services requiring consular notice of cases involving Mexican minors.[108]

Alongside this expansion in Mexico's consular infrastructure, Mexican law has seen proliferating use of writs of *amparo* seeking judicial review of consular decision-making for compliance with human rights guarantees in the Mexican Constitution. This has been especially so since an Inter-American Court of Human Rights Advisory Opinion was issued in 1999, at Mexico's request, to clarify the rights and obligations established by the VCCR, and the implications for consular decision-making of due process guarantees in the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and the Charter of the Organisation of American States.[109] In that context, the Court opined that the VCCR protects individual rights to consular information and contact as well as establishing rights and duties of states, and that non-observance of those individual rights would be prejudicial to the enjoyment of due process guarantees enshrined in international and regional human rights treaties.[110] During the decades since, this has been a recurrent point of reference for Mexican courts. Relevant case law has, however, generally revolved around the rights of foreign or dual nationals criminally detained in Mexico, rather than claims by Mexican nationals abroad contesting the adequacy of consular support provided to them.[111] At the same time, Mexican law affords those refused a visa by Mexican state officials rights of administrative and judicial review.[112]

[104]R. D. Martínez-Schuldt et al., 'The Role of the Mexican Consulate Network in Assisting Migrant Labor Claims Across the U.S.–Mexico Migratory System', (2021) 46 *Labor Studies Journal* 345; R. D. Martínez-Schuldt, 'Mexican Consular Protection Services across the United States: How Local Social, Economic, and Political Conditions Structure the Sociolegal Support of Emigrants', (2020) 54 *International Migration Review* 1016; see Valenzuela-Moreno, *supra* note 5.

[105]See Martínez-Schuldt et al., ibid., at 348–9.

[106]See Valenzuela-Moreno, *supra* note 5.

[107]J. Cicero Fernández, 'Mexican Consular and Diplomatic Functions Vis-à-Vis Private International Law and Nationality Conflicts: Towards a New Normative Framework for the Twenty-First Century', (2019) 12 *Mexican Law Review* 57, at 63, 70 (quoting Ley del Servicio Exterior Mexicano [L.S.E.M.], as amended, D.O. 4 January 1994 [Mex.], Art. 44 § III and I).

[108]R. Valenzuela, 'Interstitial Precarity: The Romance and Tragedy of the Transnational Child Welfare System', (2022) 45 *Political and Legal Anthropology Review* 94.

[109]See *Right to Information on Consular Assistance, supra* note 76.

[110]The International Court of Justice reached a different conclusion on this issue in the *Avena* Case, *supra* note 3, para. 124, discussed in V. Petrova Georgieva, 'Hierarchy Between Domestic and International Tribunals: Utopia or Near Future?', (2021) 14 *Anuario Colombiano de Derecho Internacional* 21, at 29.

[111]See, e.g., *Amparo Directo en Revisión 496/2014*, Protección Consular Doble Nacionalidad (Suprema Corte de Justicia de la Nación, Primera Sala (First Chamber of Mexico's Supreme Court of Justice)), 8 October 2014; *Amparo Directo en Revisión 5348/2015*, Derecho de asistencia consular (Suprema Corte de Justicia de la Nación, Primera Sala (First Chamber of Mexico's Supreme Court of Justice)), 25 May 2016.

[112]A. P. Ornelas Cruz and M. J. Mora, 'Institutional and Legal Migratory Framework of the United Mexican States: A Working Paper', Migration Policy Institute, 2021, 13 at 19.

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Faced with limited resources and an increasingly mobile population, South Africa has relied on partnership and outsourcing to deliver consular services abroad.[113] Some of the partnerships concerned (with Britain, for instance) make use of politico-legal architecture established when the consular jurisdiction was an important instrument of colonial expansion.[114] Meanwhile, in South African law, courts have maintained the deference commonly afforded the executive in deciding how to handle citizens' requests for consular assistance or diplomatic protection. A 2004 decision of the South African Constitutional Court (concerning South African nationals accused of plotting to overthrow the government of Equatorial Guinea) suggested a small break in this trend. A majority in that case confirmed that South Africa's Constitution affords citizens a right to request consular protection against foreign state acts contrary to international law and that the government is obliged to consider such requests appropriately.[115] Yet the Court also affirmed that '[a] court cannot tell the government how to make diplomatic interventions for the protection of its nationals' and suggested that only 'in extreme cases' would refusal of such requests be justiciable.[116] A later case confirmed that the state's response to a request for diplomatic protection could quite legitimately entail deciding 'to do nothing'.[117] South African constitutional, administrative, immigration and refugee law also provide for judicial review of visa denials by consular officials, although it remains challenging for migrants and asylum seekers to access rights guaranteed to them by law.[118]

The Australian and South African positions, and their tentative stirring in the face of countervailing claims, are broadly in line with developments in the United Kingdom. In a 2002 case concerning a British citizen detained on counter-terrorism grounds in Guantánamo Bay who sought judicial review of the government's failure to make representations to procure his release, the Court of Appeal confirmed that neither UK, European, nor international law imposes an enforceable duty to protect a citizen abroad or make representations on their behalf.[119] Even so, the Court created an opening towards judicial review of executive decision-making in this arena on administrative law grounds. It did so by opining that some categories of prerogative decision may be judicially reviewable, and that 'the Foreign and Commonwealth Office have promulgated a policy which . . . is capable of giving rise to a legitimate expectation' given the British government's 'clear acceptance . . . of a role in relation to protecting the rights of British citizens abroad, where there is evidence of miscarriage or denial of justice'.[120] The Court specified the limited scope of this expectation as follows: '[legitimate] expectations are limited and the discretion [of the executive] is a very wide one but there is no reason why its decision or inaction should not be reviewable if it can be shown that the same were irrational or contrary to legitimate expectation . . . [provided] the court [does not] enter the forbidden areas, including decisions affecting foreign policy'.[121] In the wake of calls from non-governmental organizations and

[113]M. Diedericks and J. Kgotso Tiba, 'Partnership and Outsourcing as Tools for Increased Access to Consular Services: A Case of the South African High Commission in the United Kingdom', (2015) 8(4) *African Journal of Public Affairs* 119.

[114]See generally S. I. Angell, 'The Consular Affairs Issue and Colonialism', in K. Alsaker Kjerland and B. Enge Bertelsen (eds.), *Navigating Colonial Orders: Norwegian Entrepreneurship in Africa and Oceania* (2014), 153.

[115]*Kaunda and Others v. President of the Republic of South Africa*, [2004] Constitutional Court of South Africa CCT 23/04, [2004] ZACC 5, para. [144] (per Chaskalson CJ). See S. Peteé and M. Du Plessis, 'South African Nationals Abroad and Their Right to Diplomatic Protection: Lessons from the "Mercenaries Case"', (2006) 22(3) *South African Journal on Human Rights* 439.

[116]See *Kaunda* case, *supra* note 115, paras. [73] and [69].

[117]*Government of the Republic of South Africa and Others v. Von Abo*, [2011] Supreme Court of Appeal of South Africa 283/10, [2011] ZASCA 65, para. [33].

[118]R. Amit, 'Above the Law: Securitisation in South Africa's Migration Management Regime', in M. C. Foblets and J. Y. Carlier (eds.), *Law and Migration in a Changing World* (2022), 649.

[119]*R (Abassi and another) v. Secretary of State for Foreign and Commonwealth Affairs and another*, [2002] EWCA Civ 1598., paras. 69 and 79.

[120]Ibid., at paras. 85, 87, and 92.

[121]Ibid., at para. 106. See also the discussion of relevant authorities in *Sun Myung Moon v. ECO Seoul*, [2005] UKIAT 112.

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members of parliament for the British government to provide more assistance to citizens abroad who are incarcerated or victims of crime, in 2022 the British Labour Party committed to introducing legislation establishing 'a new right to consular assistance'.[122] As far as consular decision-making around visa issuance is concerned, UK law provides rights of administrative and judicial review, although these have waxed and waned politically.[123] Once again, accessing these rights in practice is often challenging.[124]

In the US, debates about the vulnerability of consular decision-making to judicial review have revolved mainly around the so-called doctrine of consular non-reviewability in the immigration context.[125] This prevents courts from reviewing consular decisions to grant or deny visas, or set visa requirements, on the basis of Congress's plenary power to exclude aliens and regulate their entry and its conferral on the executive of exclusive enforcement power in this domain. In the absence of Congress conferring powers of review on them, courts lack subject matter jurisdiction over such matters. This doctrine was established by the US Supreme Court in 1950 in *United States ex rel. Knauff* v. *Shaughnessy* but is traceable to the infamous *Chinese Exclusion Case* of 1889 in which a treaty-based challenge to racist legislation barring immigrants from China was rejected.[126] The doctrine has been affirmed countless times since.[127]

The apparent intractability of the doctrine of consular non-reviewability notwithstanding, advocates have persistently sought to establish and widen exceptions to it by invoking, for instance, that exclusion's effect on the constitutionally protected rights of US citizens.[128] Recently, however, the US Supreme Court underscored the narrowness of such exceptions and affirmed the breadth of the discretion enjoyed by the state in immigration matters.[129]

In contrast, courts and legal scholars in the United States have spent comparatively little time debating the judicial reviewability of consular decision-making concerning the plight of US nationals abroad.[130] US legislation requires the Secretary of State to inform next-of-kin if an incident abroad affects US citizens' health and safety, and authorizes expenditure for evacuation.[131] It also requires the executive to review all cases of US nationals being detained abroad, and if they have been 'unjustly deprived of [their] liberty by or under the authority of any

[122]P. Wintour, 'Labour Vows to Give UK Citizens Abroad Legal Right to Foreign Office Help', *The Guardian,* 26 September 2022; J. Fathers, 'Beyond Discretion: The Protection of British Nationals Abroad', The Redress Trust, 2018; 'Consular Support for British Citizens: UK Parliament', 9 December 2021, available at hansard.parliament.uk/commons/2021-12-09/debates/005EA729-0D31-4487-84A4-0E11D8BE1EA1/ConsularSupportForBritishCitizens.

[123]M. Gower, 'Immigration Appeal Rights', House of Commons Library, UK Parliament, 29 August 2023, available at <commonslibrary.parliament.uk/immigration-appeal-rights/>; A. Zotti, 'The Immigration Policy of The United Kingdom: British Exceptionalism and the Renewed Quest for Control', in M. Ceccorulli et al. (eds.), *The EU Migration System of Governance: Justice on the Move* (2021), 57.

[124]T. Gammeltoft-Hansen and N. Feith Tan, 'Extraterritorial Migration Control and Deterrence', in C. Costello et al. (eds.), *The Oxford Handbook of International Refugee Law* (2021), 502.

[125]J. Lockhart, 'Construction and Application of Doctrine of Consular Nonreviewability', (2009) 42 *American Law Reports Federal 2d* 1 (updated to January 2024).

[126]*US ex rel. Knauff v. Shaughnessy* 338 US 537 (1950); *Chae Chan Ping v US (The Chinese Exclusion Case)* 130 US 581 (1889).

[127]D. S. Dobkin, 'Challenging the Doctrine of Consular Nonreviewability in Immigration Cases', (2009) 24 *Georgetown Immigration Law Journal* 113, 114–18.

[128]G. Baga, 'Visa Denied: Why Courts Should Review a Consular Officer's Denial of a U.S.-Citizen Family Member's Visa Comments', (2014) 64 *American University Law Review* 591; E. C. Callan and J. P. Callan, 'The Guards May Still Guard Themselves: An Analysis of How Kerry v. Din Further Entrenches the Doctrine of Consular Nonreviewability', (2016) 44 *Capital University Law Review* 303; D. C. Schmitt, 'The Doctrine of Consular Nonreviewability in the Travel Ban Cases: Kerry v. Din Revisited', (2018) 33 *Georgetown Immigration Law Journal* 55. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753(1972); *Rohrbaugh v. Pompeo*, 394 F. Supp. 3d 128 (DDC 2019).

[129]*US Department of State v. Muñoz*, No. 23–334, slip op. (US Supreme Court, 21 June 2024).

[130]K. D. Hughes, 'Hostages' Rights: The Unhappy Legal Predicament of an American Held in Foreign Captivity', (1993) 26 *Columbia Journal of Law and Social Problems* 555, at 556.

[131]State Department Basic Authorities Act 1956 (US), Sec. 4 and 43 (22 U.S.C. §2715).

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foreign government', to demand their release.[132] The Department of State is also required to develop and implement policies providing for the evacuation of US citizens endangered abroad.[133] Generally, however, US courts have declined to review executive decision-making surrounding consular support of US nationals, where no breach of US constitutional rights is alleged, on the rationale that executive decision-making in foreign affairs falls in the category of nonjusticiable political questions.[134] As for foreign nationals detained in the United States, US courts have held that a violation of VCCR consular notification requirements does not in itself implicate fundamental rights protected by the US constitution, placing the burden on detained foreigners to identify constitutionally protected rights prejudiced by VCCR non-compliance.[135]

What is indicated by this brief, selective survey of national (and some regional) law and practice is that consular work is a legal and political battleground growing in significance in view of many states' recourse to 'remote border control' (that is, control at the point of embarkation rather than entry).[136] It evidences the strenuous effort that states make to try to keep consular work out of the fray of broader public, community contention, and the persistence of migrant communities, other detainees and their supporters in contesting consular governance notwithstanding. States' prerogative to administer consular affairs has faced recurring challenge, even as states have generally prevailed in the face of these. In effect, consular encounters iteratively restage that classical Hegelian conundrum that has captivated so much modern political and legal thought, namely: what is a state for, and how should we grapple with the manifest shortcomings of the state form?[137] This underscores the merits of studying consular internationalism as a distinct register of international law – the focus of the next section.

4. Consular internationalism as legal theory: Demotic interface, doubling, and wormholes

There is, of course, no singular theorisation of (international) law characteristic of consular work across the board; it engages law in multiple registers, and at various scales. Beyond the meagre scaffolding of the VCCR, some regional agreements, and an expansive network of bilateral agreements on consular relations, consular work has not been highly standardized internationally, as Section 3 made plain.[138] Even so, the argument of this section is that consular work tends to configure international legal relations, especially law's relation to political economy, in somewhat heterodox ways vis-à-vis the diplomatic logic outlined in Section 2.1.

In consular internationalism, actors largely without official status (beyond having an arguable claim to being a citizen, visa holder, or asylum-seeker) seek consular services or protection from a state, often in circumstances of legal or existential precarity. In effect, they make the state answer to their demands for an articulation of the limits of its political discretion and ethico-legal concern, potentially provoking a repositioning of those limits over time. Section 3 documented

[132]Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act 2020 (22 U.S.C. §1741); Hostage Act 1868 (US) (22 U.S.C. §1732).

[133]Omnibus Diplomatic Security and Antiterrorism Act of 1986 (22 U.S.C. §4802), Sec. 103.

[134]*Flynn v. Schultz*, 748 F.2d 1186 (7th Cir. 1984), cert. denied, 474 U.S. 830 (1986), 1193–5, discussed in Hughes, *supra* note 130; B. Shah, 'The President's Fourth Branch? (Symposium: The Unitary Executive: History, Practice, Predictions)', (2023) 92 *Fordham Law Review* 499, at 520–4.

[135]*U.S. v. Bin Laden,* 132 F. Supp. 2d 168 (S.D.N.Y. 2001). See generally A. K. Wooster, 'Construction and Application of Vienna Convention on Consular Relations (VCCR), Requiring That Foreign Consulate Be Notified When One of Its Nationals Is Arrested', (2002) 175 *American Law Reports, Federal* 243.

[136]D. S. FitzGerald, 'Remote Control of Migration: Theorising Territoriality, Shared Coercion, and Deterrence', (2020) 46 *Journal of Ethnic and Migration Studies* 4. The term 'remote border control' was coined by Aristide Zolberg whose work FitzGerald cites.

[137]See G. W. F. Hegel, *Elements of the Philosophy of Right* (Allen W Wood editor, HB Nisbet translation, 1991), 275–371; L. J. Goldstein, 'The Meaning of "State" in Hegel's Philosophy of History', (1962) 12 *Philosophical Quarterly* 60.

[138]See note 70, *supra*.

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some shifts in national law that may be understood in these terms, most notably in Mexico, as well as states' struggle to counteract them. Similarly, Stephan Scheel's empirical research reveals visa applicants collectively inferring the criteria guiding consular officials' decision-making, through sharing stories and tailoring applications accordingly, potentially eliciting changes in official policy or practice over time.[139] Because these strategic manoeuvres on the part of visa applicants may influence governance, this may be understood as re-surfacing the law-generative capacity of unruly collectives and unauthorized individuals in, around, and despite the ubiquity of the state form in international law.

As a register of demotic interface (that is people-state interface), consular work elicits a range of different versions of the state-citizen relation mediated by law, as Section 2 made apparent. These are 'traditionally more intimate in nature' than people-state relations engendered by diplomacy because they often concern intimate, familial, or highly personal predicaments.[140] Consular work requires state officials to interpret authoritatively, and before an audience of at least one other (even a terrorism suspect, as in the Australian, South African, and UK cases mentioned above), some or all of the state's protective, relation-promoting, information-gathering, mobility-supporting, provisioning, assistive, administrative, safeguarding, representative, transmissive, supervisory, dispute-settling, and other powers and purposes, paraphrasing VCCR Article 5's statement of consular functions, discussed in Section 2.[141] In the process, consular internationalism sees the state acting in modes identifiable at once with private international law (that is, mediating individuals' and firms' multi-jurisdictional disputes and attachments) and public international law (that is, mediating state-to-state relations). All the while, states generally remain adamant that they are acting politically, in exercise of sovereign prerogative. In this way, consular internationalism scrambles those public/private distinctions that typically do so much work in international legal thought and practice.[142]

In consular encounters, law/politics, public/private, and discretionary/non-discretionary distinctions are rendered unstable. The handling of consular requests requires state officials to activate their discretionary capacity or articulate the relationship between their political agency and their legal office. Ethnographic studies of consular work confirm the considerable 'room for manoeuvre' consular officials enjoy, and the extent to which local know-how shapes their work.[143] This is in the context of states' general insistence that consular decision-making is a matter of sovereign prerogative, as Section 3 made clear.[144] Yet this very insistence on sovereign rule of consular discretion discloses states' awareness of the collective stakes in it, and states' concern about its expectation-creating potential, offering further indicia of its juridical significance. States generally treat consular policy and protocol as sensitive government information, not for public disclosure;[145] China's aversion to media scrutiny of its consular decision-making (highlighted in Section 3) is not exceptional. This combination of positions that states routinely take suggests that consular work is at once political and law-making; unfettered and regulated; core business of government and highly individualized.

[139]See Scheel, *supra* note 28, at 144.

[140]C. Mallory, 'Abolitionists at Home and Abroad: A Right to Consular Assistance and the Death Penalty', (2016) 17 *Melbourne Journal of International Law* 51, at 54.

[141]See VCCR, *supra* note 10, at Art. 5.

[142]M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2006), at 601–15.

[143]See Alpes and Spire, *supra* note 13, at 270. See also F. Infantino and A. Rea, 'The Mobilization of a Local Practical Knowledge: The Granting of Schengen Visas at the Belgian General Consulate in Casablanca', (2012) 24 *Sociologies pratiques* 67; see Infantino, *supra* note 13; S. Scheel, '"The Secret Is to Look Good on Paper": Appropriating Mobility Within and Against a Machine of Illegalization', in N. De Genova (ed.), *The Borders of 'Europe': Autonomy of Migration, Tactics of Bordering* (2017), 37.

[144]See Okano-Heijmans, *supra* note 14, at 477; see Alpes and Spire, *supra* note 13.

[145]J. Melissen, 'The Consular Dimension of Diplomacy', in Melissen and Fernández, *supra* note 51, 1 at 5, 30.

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Consular officials are called upon by the terms of their employment and surroundings to discipline those unruly encounters characterized here as law-generative (with physical barriers, signage, and surveillance infrastructure being ubiquitous in consular premises).[146] Empirical studies attest to the distance between consular officials and those seeking services materialized through the architecture of consular offices, outsourcing of consular work, and requirements for queueing, screening, and waiting. They also attest to applicants' indefatigable efforts to contest these separations. Spontaneous acts of protest occur quite regularly at consular premises.[147] And, as noted above, visa applicants routinely share lay intelligence to try to surmount these barriers.[148] The diminutive playing down of consular work as 'mere' service work of relatively low prestige in the international legal field (an implicit 'nothing to see here') forms part of the ritualized distancing key to states' efforts to keep these encounters under control.[149] This has helped the international legal significance of consular work to go largely underappreciated.

As well as muddying distinctions between discretionary and non-discretionary, public and private decision-making, consular internationalism scrambles orthodox configurations of law and political economy internationally. Consular relations entail both inward- and outward-facing forms of lawful address, and frequently both simultaneously.[150] Accordingly, consular internationalism may have a doubling, distorting effect on received patterns of entitlement and disentitlement, even as it affirms the axiomatic status (and distributive significance) of the bond of nationality in international law. When set *outside* a state's territorial jurisdiction, consular articulations of the state-national relationship, and the relative importance of different nationals to the state, do not necessarily correspond to those routinized *within* that state. Consular encounters often accord with the dynamics of global inequality, as the literature on global migration inequality attests.[151] Yet they also potentially confound domestic and international hierarchies, potentially opening them to question.

A state's concern for a relatively underprivileged national abroad may not conform with the position it would take were that state-national relationship staged 'at home', for instance. A Mexican national facing criminal charges or civil suit in Mexico may need to establish eligibility for legal aid by proving that they are a welfare recipient, on a low income, or a member of a protected group (migrants, children, displaced persons, refugees). And even then, their access to legal aid may be contingent on whether they live in an urban or rural area.[152] Were the same Mexican national to face criminal charges in the United States, Mexican consular officials may well assist that national to secure legal representation without any such preconditions having necessarily been met.[153] US case law on exceptions to consular non-reviewability, noted in Section

[146]On consular officials' typical work practices and surroundings, see C. G. Hofstadter, *Modern Consuls, Local Communities and Globalization* (2020).

[147]See, e.g., spontaneous protests described in F. Infantino, 'The Public Encounter as Object of Delegation', in P. Hupe (ed.), *The Politics of the Public Encounter: What Happens When Citizens Meet the State* (2022), 235; Scheel, *supra* note 28, at 114.

[148]H. Drotbohm, 'How to Extract Hope from Papers?: Classificatory Performances and Social Networking in Cape Verdean Visa Applications', in N. Kleist and D. Thorsen (eds.), *Hope and Uncertainty in Contemporary African Migration* (2016), 21 at 30.

[149]See Platt, *supra* note 9; I. Kemish, *The Consul: An Insider Account from Australia's Diplomatic Frontline* (2022), at 33 (on 'the categorisation of consular . . . officers as [in] a separate – and lesser – "stream"' to diplomatic officers within the Australian foreign service).

[150]See Okano-Heijmans, *supra* note 14, at 478.

[151]See McAuliffe et al., *supra* note 30; S. Mau, 'Mobility Citizenship, Inequality, and the Liberal State: The Case of Visa Policies', (2010) 4 *International Political Sociology* 339.

[152]United Nations Office on Drugs and Crime & United Nations Development Programme, 'Global Study on Legal Aid Country Profiles', United Nations, 2016, 242, available at www.unodc.org/documents/justice-and-prison-reform/LegalAid/GSLA_-_Country_Profiles.pdf.

[153]See Martínez-Schuldt et al, *supra* note 104, at 359.

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3, highlights that outward-facing foreign policy decisions often have inward-facing impacts (on US citizens): a potential basis for forging community-level political alliances across borders.[154]

Conversely, those who enjoy greatest privilege within a state often cannot ensure that privilege's continued efficacy throughout consular encounters. Scheel recalls one official working in the visa section of a Schengen member state embassy in a North African country telling him: '[i]n the context of a large informal economy, even very rich businesspeople find it difficult to provide [the required] documents confirming their wealth'.[155] That said, wealth does tend to smooth the way through consular encounters, in part because of the range of visas available globally that are conditional upon meeting certain economic or investment criteria.[156]

In these ways and others, consular internationalism raises the question, again and again, of what is 'properly' to be expected of a state, for whom state officials are working, and to whom they ought to be answerable. Why should Mexican nationals' entitlement to legal aid funded by the Mexican state potentially be more generous when they seek that support outside Mexico than if they do so from within Mexican territory (if indeed that is the case; the studies cited above do not make this clear)? Why not expand Mexican legal aid entitlements domestically, in view of their expansion abroad via Mexico's consular network? In the context of consular officials' scrutiny of qualifications, assets, and community attachments, what is the justification for states valuing some forms of social and economic capital over others, and how do these values get reproduced in law and practice? These are among the questions of international law and political economy that consular internationalism raises afresh.

The destabilizing effect that consular internationalism may have on established patterns of entitlement and disentitlement internationally is part of what this article has metaphorized in its references to wormholes. In science and fiction (especially science fiction), a wormhole connects one place in space and time to another in ways occasioned by, yet not determined by, the prevalence of massive objects nearby: objects that in international law might translate to states and international organizations.[157] In vermiculture (cultivation of worms for environmental management or agricultural purposes), wormholes are conceived of quite differently and their morphology and transience vary by species.[158] They are *biogenic*: products of worms' activities of digging and digesting – their wavelike burrowing and secretion of casts (comprised of nutrient-rich soil passed through a worm's stomach). They are also *biogenerative*: the continuous construction and destruction of wormholes aid dispersal of air, water, and nutrients throughout soil and organic matter, with important ecological implications.

The foregoing metaphor captures something of how consular internationalism perforates international law's signature configurations of international legal order. Consular internationalism is juris-genic and juris-generative as Sections 2 and 3 showed, respectively. And these dynamics often do not conform to international law's classical topographies: its typical approach to territoriality; preoccupation with apex officialdom (views and actions of heads of state, foreign ministers, and captains of industry); or distributive presumptions (that is, how international law anticipates resources being 'properly' meted out worldwide, namely on the basis of official policies adopted and enforced within the bounds of national jurisdiction, or otherwise by states' agreement). Consular internationalism fragments territory and anticipates multijurisdictional

[154]E.g., *Kleindienst v. Mandel, supra* note 128 (a 1972 US Supreme Court ruling that scholars and students at Stanford University were constitutionally entitled to judicial review of a consular decision to deny a visa to their invitee, a Belgian Marxist economic theorist, on First Amendment grounds, although courts could not scrutinize such decisions beyond assessment of their facial legitimacy and bona fides).

[155]See Scheel, *supra* note 28, at 116.

[156]See, e.g., G. Liu-Farrer, 'Migration as Class-Based Consumption: The Emigration of the Rich in Contemporary China', (2016) 226 *The China Quarterly* 499.

[157]See Tillman and Harvey, *supra* note 32.

[158]A. Vidal et al., 'The Role of Earthworms in Agronomy: Consensus, Novel Insights and Remaining Challenges', in D. L. Sparks (ed.), *Advances in Agronomy* (2023), vol. 181, 1 at 9–16.

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attachment; foregrounds the work of mid-level officials and those with semi-official status (such as honorary consuls); and effects international resource-distribution through combinations of governmental and commercial, formal and informal, public and private action.

Even as consular internationalism takes shape through claim and struggle, and the ensuing opening and closing of legal wormholes, it often reinforces structural inequalities globally, as already noted. To enter the domain of consular internationalism at all, people need to cross a border, or make plans to do so, and borders are powerful techniques of sorting and selective control.[159] Interactions with consular officials are often contingent on visa requirements and related entitlements the distribution of which correlates closely with other forms of inequality; '[t]he richer the country of origin, the more visa-free travel options its citizens enjoy'.[160] Disparities of wealth, class, and residency status often intertwine with those of gender, sexuality, and race in consular interactions.[161] Consular internationalism may open inequality to question: by drawing attention to the difference between relative entitlements 'at home' and abroad, for instance. Yet it also expresses new or compounded manifestations of inequality.

What the disjunction between consular internationalism and diplomatic internationalism may occasion, nevertheless, is the prospect of one dimension of structural bias being set against another. This may open a way for 'transformative action' against bias, as Koskenniemi has suggested, although international law does not assure this prospect.[162] In this respect, consular internationalism is a counterpart to the 'actually existing cosmopolitanism' that Karen Knop discerned in common law private international law renderings of citizenship.[163] It is to these kinds of contrapuntal possibilities, and the problems that consular internationalism presents for international law, to which the next section turns.

5. Consular internationalism in international law: Possibilities, problems, conclusion

5.1. Possibilities

In creating wormholes of relation through hierarchies of diplomatic internationalism, consular internationalism holds latent anti-domination potential. This is manifest in the legal proceedings discussed in Section 3, through which otherwise marginalized figures – racialized immigrants and persons detained on counter-terrorism grounds, for instance – have sometimes gained the 'ear' of the state for a time: an intimacy long the preserve of the well-connected and well-resourced. People gaining the state's 'ear' via consular officials also occurs routinely outside courtrooms.[164] Of course, even when turned at one's request, the ear of the state may not be receptive or benevolent. The ambivalent impacts of power extended in an assistive mode (that is, in the mode of heeding, provisioning, and aiding) are not to be under-estimated. And, as the discussion of South African law in Section 3 made plain, states are often legally entitled to do nothing at all in response to a consular assistance request. Nevertheless, that consular internationalism opens routes for those of no rank to orient concern and potentially mobilize action on the part of government officials means that it retains some power-devolving, hierarchy-inverting potential.

Consular internationalism also allows for multiplicity and hybridity in peoples' relationships internationally. This contradicts zero-sum renderings of statehood. In a consular world, one state can 'perform consular services on behalf of another state', assuming responsibility for another's

[159]É. Balibar, 'What Is a Border?', in É. Balibar, *Politics and the Other Scene* (2002), 75.

[160]See Mau, *supra* note 151, at 348.

[161]S. Chauvin et al., 'Class, Mobility and Inequality in the Lives of Same-Sex Couples with Mixed Legal Statuses', (2021) 47 *Journal of Ethnic and Migration Studies* 430.

[162]See Koskenniemi, *supra* note 142, at 615.

[163]K. Knop, 'Citizenship, Public and Private', (2008) 71 *Law and Contemporary Problems* 309, at 311.

[164]See Hofstadter, *supra* note 7.

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nationals.[165] For instance, the Swedish Embassy in Pyongyang provides consular services to US citizens in North Korea.[166] Consular cross-cultivation of legal relationships on the international plane does not, moreover, demand any weakening of national or sub-national allegiances. This is in marked contrast to a neoliberal approach to internationalism, aimed at weakening such allegiances, as encapsulated by Friedrich Hayek's suspicion of 'solidarity of interests'.[167]

Consular internationalism's allowance for concurrent solidarities that might otherwise be considered mutually exclusive holds potential for circumventing or unlocking logjams in international conflicts, even violent conflicts. For instance, 'it is possible – although unusual – for a state to launch or maintain consular relations without also having agreed upon the establishment of diplomatic relations'.[168] After the Falklands War/*Guerra de Malvinas*, for example, Argentina and the UK resumed consular relations long before any restoration of diplomatic relations was considered possible.[169]

Considering all the polysemic possibilities for international relationship that consular internationalism enlivens takes one back to the question of whether consular work is well understood, as it has been, as '[s]ituated . . . between the international [legal] system and global society'.[170] The foregoing discussion has shown otherwise, indicating that consular work does not just 'respond[ ] to external pressures or events' of societal origin. Rather it is 'continually invented and reinvented *internally*', generating and casting off different configurations of society in the process.[171] Consular internationalism underscores that international legal determinacy, including supposedly determinative law-society dynamics, are not easy to sustain.

5.2. Problems

Perils of consular internationalism have already been canvassed, among them, its propensity to compound inequality. Some worry, also, about the distorting effect, on states' foreign policy decision-making, of '[h]ighly mediatized consular assistance'.[172] Given that relatively few who seek consular assistance can marshal the resources or contacts necessary to make something '[h]ighly mediatized', this is a legitimate worry pertinent to the rise of what Achille Mbembe has called 'private indirect government'.[173]

Also problematic is the consular prioritisation of a tortious logic on the international legal plane. One influential view of tort regards it as concerned primarily with private administration aimed at civil recourse (that is, enabling an injured party to recover from whomever has legally wronged them).[174] Understanding the international legal field in such terms casts international law as compensatory for the excesses and shortcomings of national law and politics, rather than as a distinct sphere of juridical relation with its own collectivizing, imaginative possibilities. Insofar as consular internationalism encourages governments to be moved by the needs and claims of nationals seeking individualized recovery, rather than pursuing collectively thrashed-out understandings of common good, it risks propagating an impoverished, derivative understanding

[165]See Okano-Heijmans, *supra* note 14, at 477.

[166]M. Andersson and J. Bae, 'Sweden's Engagement with the Democratic People's Republic of Korea', (2015) 11 *North Korean Review* 42.

[167]F. A. von Hayek, 'The Economic Conditions of Interstate Federalism', in F. A. von Hayek, *Individualism and Economic Order* (1948), 255 at 257–8.

[168]See Okano-Heijmans, *supra* note 14, at 476.

[169]M. Evans, 'The Restoration of Diplomatic Relations Between Argentina and the United Kingdom', (1991) 40 ICLQ 473.

[170]See Melissen, *supra* note 17, at 251.

[171]R. Mawani, 'The Times of Law', (2015) 40 *Law & Social Inquiry* 253, at 260.

[172]See Okano-Heijmans, *supra* note 85, at 25.

[173]A. Mbembe, *On Private Indirect Government* (2000).

[174]M. L. Rustad, 'Twenty-First-Century Tort Theories: The Internalist/Externalist Debate (American Association of Law Schools Torts & Compensation Systems Panel)', (2013) 88 *Indiana Law Journal* 419; N. Donahue and J. F. Witt, 'Tort as Private Administration', (2020) 105 *Cornell Law Review* 1093.

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of the international legal field. This could have deleterious implications for the reach and potential of international legal work.

A related challenge is that consular internationalism's rise, together with the insulation of consular decision-making from judicial and public scrutiny (described in Section 3), may signal a 'quiet[ ] undoing [of] basic elements of democracy' and, where commercial outsourcing of consular work is concerned, the 'ever-growing intimacy of corporate and finance capital with the state', as documented by Wendy Brown.[175] One stated aim of this article was to delink consular work from the logic of neoliberalism. Nonetheless, as noted above, consular internationalism threatens to diminish the pool of collective resources available for the conduct of internationalism in non-transactional modes. I worry, as Okano-Heijmans does, that 'the share of collective goods assigned . . . to individuals for their personal use [in response to appeals for consular assistance] is beginning to impinge on the share at the disposal of government and public authorities for the collective benefit of society'.[176] There is a risk that climactically imperilled states could spend so much of their resources addressing the immediate consular needs of their nationals that they have insufficient resources to dedicate to sustaining collective life into the future, both human and nonhuman.

5.3. Conclusion

Scholars of political and social theory have analyzed at length the violent stratification that maintenance of international legal order demands, and the persistence, nonetheless, of pluralities that do not depend on any absolute convergence of identity, value, or class.[177] People on the move everywhere, especially racialized and oppressed peoples, have hard-won expertise on the difficulties of propagating such hybridized communities, as well as their life-sustaining potential. This article has shown consular internationalism to be far more open to ambivalent, plural attachments than international law in its predominant, diplomatic register, which openness is potentially something that may be further leveraged. Whether in courts or tribunals, and/or through broader social organizing (of which Section 3 offered examples), the popular confrontations with hierarchy that consular internationalism occasions have sometimes moved the law in novel directions. The argument of this article is that consular internationalism offers people a legal vocabulary and 'store of technicalities' that could aid such endeavours.[178]

This article began with the disjunction between two internationalisms, styled schematically as diplomatic and consular. Its starting premise was that the latter has been subordinated to the former, but that consular internationalism is of growing significance in international affairs. Section 2 canvassed how these two versions of internationalism differ, with attention especially to their expression in the VCDR and VCCR. Section 3 examined some controversies provoked by consular work by looking at plaintiffs' efforts in several national jurisdictions to contest consular decision-making and subject it to judicial review. This precipitated delving further into what might make consular internationalism such live terrain of struggle; Section 4 explored some theorizations of international law, and law's relationship to political economy, that emerge in and from consular work. Section 4 employed a metaphor to convey this potentiality of consular internationalism: namely, its propensity to make and remake legal wormholes allowing for

[175]W. Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (2015), at 17, 29.

[176]See Okano-Heijmans, *supra* note 14, at 477.

[177]See, e.g., É. Balibar, *Equaliberty: Political Essays* (J. Ingram translation, 2014); É. Balibar, 'The "Impossible" Community of the Citizens: Past and Present Problems', (2012) 30 *Environment and Planning D: Society and Space* 437; J.-L. Nancy, 'The Inoperative Community', in P. Connor (ed.), *The Inoperative Community* (L. Garbus, M. Holland and S. Sawhney translation, 1991), 1.

[178]See Knop, *supra* note 163, at 341.

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community organizing within international law and possible challenging of its unequal effects. Finally, this section has reflected on the possibilities and problems that may be associated with foregrounding a consular optic in international legal work.

It may seem paradoxical to identify such possibilities with consular internationalism given its frequent association with behind-the-scenes power and antidemocratic politics. In 2022, for example, the International Consortium of Investigative Journalists, together with ProPublica and others, reported on five hundred instances worldwide of current and former honorary consuls being accused of crimes, corruption, or supporting authoritarian regimes, noting little public transparency surrounding their appointment or work.[179] More recent revelations of the anti-immigrant Law and Justice party in Poland running a visa-for-bribes rort underscore the sense, in many jurisdictions, that consular work is synonymous with elite impunity.[180] Migration researchers have also shown consular officials to be profoundly implicated in the racial politics of migration control.[181] There are, of course, countless stories of consular officials doing solidaristic work for the least advantaged, but the labour in question is often characterized by states as market-responsive customer service.[182] Consular relations do not comprise an obvious resource for advancing radical or progressive counter-imaginings of international legal order.

Yet, it may be precisely the fact of consular work being so entwined with global forces with which international lawyers have struggled to grapple effectively that makes it counterintuitively generative for international lawyers to think and work with.[183] The international legal repertoire addressed to inequality ought not to be restricted to criminalization, public shaming, or human-rights-informed programmes of equity, diversity, and inclusion. It ought not to be dominated by vocabularies of incremental tinkering among the usual suspects. International legal practice is far more plural than such tactics would suggest. One could take the rise of consular internationalism as a harbinger of the unstoppable march of 'private indirect government'.[184] Or one could understand consular internationalism as making room for further expansion – through litigation, community organizing, and more – of egalitarian possibilities immanent in the international legal field. This article is aimed in the latter direction.

[179]D. Reuter et al., 'Investigations: Shadow Diplomats', 21 December 2022, available at www.icij.org/investigations/shadow-diplomats/how-a-global-data-dive-uncovered-hundreds-of-honorary-consuls-linked-to-crimes-or-scandals/.

[180]R. Schmitz, 'What We Know about the Visa Scandal in Poland', *NPR*, 18 September 2023, available at www.npr.org/2023/09/18/1200197639/what-we-know-about-the-visa-scandal-in-poland. Cf. U.S. Department of Justice, 'Former U.S. Consulate Official Sentenced to 64 Months in Prison for Receiving Over $3 Million in Bribes in Exchange for Visas', 14 August 2015, available at www.justice.gov/opa/pr/former-us-consulate-official-sentenced-64-months-prison-receiving-over-3-million-bribes.

[181]E.g., A. Ellermann and A. Goenaga, 'Discrimination and Policies of Immigrant Selection in Liberal States', (2019) 47 *Politics & Society* 87.

[182]See, e.g., J. M. Semple, 'Everyday Hero: Canadian Consular Worker Provides "Human Warmth and Contact" Overseas', *Global News*, Canada, 14 December 2017, available at www.globalnews.ca/news/3918287/everyday-hero-canadian-consular-worker-provides-human-warmth-and-contact-overseas/.

[183]Karen Knop taught me a great deal about seeking opportunity amid anxiety, and counterintuitive possibility at sites that seem like dead patches or danger zones for international legal work. See, e.g., K. Knop, 'Foreign Relations Law: Comparison as Invention', in C. A. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (2019), 44. I have worked into this vein in prior writings; see, e.g., F. Johns, *Non-Legality in International Law: Unruly Law* (2013); F. Johns, *#Help: Digital Humanitarianism and the Remaking of International Order* (2023).

[184]See Mbembe, *supra* note 173.

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